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CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

RICHARD GANS, on behalf of himself and all  
others similarly situated,

Plaintiff,

v.

PALMONE, INC., and DOES 1 through 100  
inclusive,

Defendants.

CLASS ACTION COMPLAINT

CIVIL ACTION NO.: **C05 03774**

1. VIOLATION OF THE CONSUMER  
LEGAL REMEDIES ACT, CIVIL  
CODE §§ 1750 *ET SEQ.*;
2. VIOLATION OF BUSINESS &  
PROFESSIONS CODE SECTION  
17200 *ET SEQ.*; AND,
3. VIOLATION OF BUSINESS &  
PROFESSIONS CODE SECTION  
17500 *ET SEQ.*

DEMAND FOR JURY TRIAL

BY FAX

## I.

INTRODUCTION

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3 1. This is a civil action alleging the violation of the Consumer Legal Remedies Act,  
4 Civil Code §§ 1750 *et seq.*, the violation of Business & Professions Code §§ 17200 *et seq.*, and the  
5 violation of Business & Professions Code §§ 17500 *et seq.* for Defendant's unlawful, unfair,  
6 fraudulent and/or deceptive business acts or practices, Defendant's pattern and practice of  
7 fraudulently, unfairly, deceptively, and unlawfully marketing, advertising, promoting and selling  
8 defective mobile telephone, the Trēo™ 650 smartphone.

9 2. Plaintiff Richard Gans, by and through his attorneys, based on his individual  
10 experience and investigation of counsel, and on information and belief, allege on behalf of himself  
11 and all other similarly situated persons and entities who own a palmOne, Inc., Trēo™ 650  
12 smartphone as follows:

13 3. Defendant palmOne, Inc. ("palmOne") is a California Corporation that designs,  
14 manufactures, markets, advertises, promotes, distributes and sells mobile telephone, the Trēo™  
15 650 smartphone.

16 4. As alleged more fully herein, Defendant has made misrepresentations and  
17 concealed material information in the marketing, advertising, and sale of a consumer product, a  
18 mobile telephone called the Trēo™ 650 smartphone (the "Treo 650").

19 6. The Treo 650 at issue fails to properly download email messages automatically, a  
20 feature of the phone widely advertised and promoted by Defendant palmOne, Inc.

21 7. In particular, Defendant palmOne, Inc. represented to Plaintiff and members of the  
22 class that its Treo 650 phones would automatically download email messages. Plaintiff's  
23 experiences, mirroring those of thousands of other Treo 650 purchasers who have recounted their  
24 problems with the palmOne, Inc. phone reveal that is not the case.

25 8. Defendant palmOne similarly concealed material facts regarding its Treo 650,  
26 including that it fails to perform as represented, that it is incapable of automatically downloading  
27 email messages, is inherently defective, is not of merchantable quality, and is substantially certain  
28 to malfunction and fail before the end of the useful life of the product.

12           12. All of these claims herein arise out of these misrepresentations and failures to  
13 disclose on the part of Defendant palmOne, Inc., and are common as to each consumer and/or end  
14 user of the Treo 650 phone.

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III.PARTIES

16. Plaintiff Richard Gans, an individual, is a resident of Chesterfield, Missouri, and the purchaser of a Trēo™ 650 smartphone, manufactured by Defendant palmOne, Inc.

17. Defendant PalmOne, Inc., is a public corporation with headquarters in Milpitas, California. Defendant PalmOne, Inc. designs, manufactures, markets, and promotes the Trēo™ 650 smartphone that are the subject of this complaint throughout the United States.

18. From its headquarters in Milpitas, California, Defendant PalmOne, Inc. designs, manufactures, markets, and promotes the Trēo™ 650 smartphone. Defendant palmOne, Inc. sells a significant number of Trēo™ 650 smartphones to California residents. Plaintiff is informed and believes and thereon alleges that defendant palmOne, Inc.'s employees and/or agents responsible for the advertising, marketing and/or promotional literature, including the product packaging for the subject products are located in California and/or the decisions concerning the design, manufacture, marketing and advertising emanated from, or where authorized and/or approved by Defendant's corporate officers, executives and employees located in California.

19. Plaintiff is informed and believes and thereon alleges that Defendants Does 1 through 100 are corporations, or are other business entities or organizations of a nature unknown to Plaintiff.

20. Plaintiff is unaware of the true names of Defendants Does 1 through 100. Plaintiff sues said Defendants by said fictitious names, and will amend this complaint when the true names and capacities are ascertained or when such facts pertaining to liability are ascertained, or as permitted by law or by the Court. Plaintiff is informed and believes that each of the fictitiously named defendants is in some manner responsible for the events and allegations set forth in this complaint.

21. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each defendant was a developer, designer, manufacturer, distributor and seller of the PalmOne, Inc.'s Trēo™ 650 smartphone, was the principal, agent, partner, joint venturer, officer, director, controlling shareholder, subsidiary, affiliate, parent corporation, successor in interest and/or

1 predecessor in interest of some or all of the other defendants, and was engaged with some or all of  
2 the other defendants in a joint enterprise for profit, and bore such other relationships to some or all  
3 of the other defendants so as to be liable for their conduct with respect to the matters alleged in  
4 this complaint. Plaintiff is further informed and believes and thereon alleges that each defendant  
5 acted pursuant to and within the scope of the relationships alleged above, and that at all relevant  
6 times, each defendant knew or should have known about, authorized, ratified, adopted, approved,  
7 controlled, aided and abetted the conduct of all other defendants. As used in this complaint,  
8 "Defendant," "Defendant palmOne, Inc.," and "defendants" means "defendants and each of them,"  
9 and refers to the defendants named in the particular cause of action in which the word appears and  
10 includes palmOne, Inc. and Does 1 through 100.

11 22. At all times mentioned herein, each defendant was the co-conspirator, agent,  
12 servant, employee, and/or joint venturer of each of the other defendants and was acting within the  
13 course and scope of said conspiracy, agency, employment, and/or joint venture and with the  
14 permission and consent of each of the other defendants.

#### 15 IV.

#### 16 FACTUAL ALLEGATIONS

17 23. The Treo™ 650 smartphone, manufactured and distributed by Defendant palmOne,  
18 Inc., combines into mobile phone a personal information organizer, instant messaging, and  
19 Internet access. The Treo also acts an MP3 music player and a digital camera that captures video.  
20 And, according to Defendant palmOne, the Treo 650 is also capable of automatically downloading  
21 email messages.

22  
23 24. Defendant palmOne disseminated inaccurate information in the advertising,  
24 marketing, and promotion of the Treo 650, specifically with respect to the ability of the device to  
25 automatically download email messages.

26 25. The Treo 650 is advertised as being able to automatically download email  
27 messages and palmOne represents on its website that the Treo 650 will "get business and personal  
28 email automatically downloaded to your phone based on a schedule you specify."



1 (<http://web.palmone.com/products/smartphones/treo650/versamail.jhtml>.) In spite palmOne's  
2 advertising and promotion of this functionality, the Treo 650 does not automatically download  
3 email messages. In fact, even while palmOne's advertising and promotion touts the Treo 650's  
4 automatic mail download capabilities, the company is aware that the automatic download feature  
5 does not work. Technical support personnel from palmOne have confirmed in conversations with  
6 consumers that the automatic download feature of the Treo 650 does not work and the company is  
7 unable to provide a solution to make the phone properly download email messages.

8       26. With the Treo 650 phone, palmOne provided purchasers a "User Guide for the  
9 VersaMail® Application." The VersaMail feature was intended to provide the Treo 650 will the  
10 capability to automatically download email messages. The User Guide describes how to configure  
11 the Treo 650 to permit the automatic download of email messages, explaining that "You can set up  
12 different schedules for each of your email accounts." The User Guide describes the VersaMail  
13 feature as permitting the consumer to set the schedule for messages to be automatically  
14 downloaded to the Treo 650 at intervals as frequently as every "5 minutes" and indicates that you  
15 can set your phone to alert you "with a beep or alert sound . . . when a new message arrives in  
16 your account."

17       27. As recently as June 2005, palmOne made following representations on its website  
18 regarding the Treo 650 automatic email download feature called VersaMail:

19       Your email on your schedule.

20       Stay on top of your life with Auto Sync: get business and a personal email  
21 automatically downloaded to your phone based on a schedule you specify, and new  
22 mail alerts based on your preferences. VersaMail supports up to 8 email accounts  
— POP, IMAP, APOP, and ESMTP.

23 (<http://web.palmone.com/products/smartpobnes/treo650/versamail>.)

24       28. Defendant palmOne, Inc. failed to adequately manufacture and/or test the Treo 650  
25 to ensure that it was free from defects. Before the Treo 650 phones even reached the market,  
26 Defendant knew or should have known, or were reckless in not knowing, that its phones failed to  
27 perform the email download function.

28

1       29. In spite of its knowledge, Defendant marketed its Treo 650 phones as capable of  
2 automatically downloading email messages.

3       30. The true facts about the Palm One, Inc. Treo 650 is that they are not reliable, are  
4 prone to failure, and are substantially certain to fail to operate properly in that they do not  
5 automatically download email messages as advertised.

6       31. Yet, even after receiving an extraordinary number of complaints from purchasers  
7 and users of the Treo 650 phone complaining of the same type of automatic email download  
8 failure, Defendant palmOne has continued to conceal material information and has refused to  
9 disclose or warn users of the defective nature of the Treo 650 phone. Although Defendant  
10 palmOne has been aware of the problems with the automatic email download feature in the Treo  
11 650 phone, it has never sought to warn or reveal this material information to its customers.  
12 Rather, Defendant palmOne has consistently represented that there is nothing wrong with the  
13 performance of its Treo 650 phone.

14       32. To this day, Defendant palmOne continues to conceal material information from  
15 users, consumers, and the public, that (a) the Treo 650 phone is incapable of automatically  
16 downloading email messages; (b) the Treo 650 is inherently defective and substantially certain to  
17 manifest itself by malfunctioning and/or failing before the end of the useful life of the product;  
18 and (c) the Treo 650 is not of merchantable quality. The Treo 650 is of such a low quality and are  
19 so defective that defendants know they consistently fail and that consumers are substantially  
20 certain to fail to perform the automatic email download function. Nevertheless, Defendant  
21 palmOne has refused to disclose to customers the existence of the defective download feature and  
22 the loss of performance and functionality caused thereby.

23       33. In the end, the harm caused by Defendant's false and misleading affirmative  
24 statements and omissions grossly outweighs any benefit that could be attributed to them.

25       34. Knowing the truth and motivated by profit and market share, Defendant has  
26 knowingly and willfully engaged in acts and/or omissions to mislead and/or deceive plaintiff and  
27 others similarly situated.  
28

35. The defective Treo 650 phone has resulted and will continue to result in significant loss and damage to the class members, including but not limited to loss of the use and function of the phone, replacement and cost of repair.

36. The facts which Defendant misrepresented and concealed as alleged in the preceding paragraphs, were material to the decisions about whether to purchase the Treo 650 in that plaintiff and others similarly situated would not have purchased the Treo 650 but for Defendant's unlawful, unfair, fraudulent and/or deceptive acts and/or practices.

37. Defendant is engaged in the unlawful, unfair, fraudulent, untrue and/or deceptive marketing and advertising scheme to induce consumers to purchase its Treo 650 as a phone capable of the automatic download of email messages.

38. Defendant's unlawful, unfair, fraudulent, untrue and/or deceptive acts and/or practices were committed with willful and wanton disregard for whether or not plaintiffs or others similarly situated would actually receive a phone capable of automatic email message download functionality.

39. Upon information and belief and at all times relevant, Defendant palmOne possessed full knowledge and information concerning the above facts about its Treo 650 phone, the phone that it manufactured, created, designed, tested, labeled, packaged, distributed, supplied, marketed, sold, advertised, and otherwise distributed into the stream of commerce in the United States.

V.

### CLASS ACTION ALLEGATIONS

40. Plaintiff brings this action pursuant to Federal Rules of Civil Procedure 23(b)(3) on behalf of himself, on behalf of all others similarly situated ("the "Class"), initially defined as:

All persons residing in the United States who purchased, or will purchase a PalmOne, Inc., Trēo™ 650 smartphone, between the date Defendant respectively placed each of these Trēo™ 650 smartphones into the stream of commerce through the date the Court certifies this suit as a class action. (The class specifically does not include any claims seeking damages for personal injuries or property damage resulting from defects as alleged herein). Excluded from the Class are Defendants, any parent, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors,



1 agents, servants, or employees of Defendants, and the immediate  
2 family member of any such person. Also excluded is any trial judge  
who may preside over this case.

3 41. Plaintiff does not know the exact number of class members because such  
4 information is in the exclusive control of Defendant. However, due to the nature of the trade and  
5 commerce involved, Plaintiff believes that the members of the Class are sufficiently numerous and  
6 geographically diverse that joinder of all members of the Class is impracticable. Fed.R.Civ.P.  
7 23(a)(1).  
8

9 42. There are questions of law or fact common to the Class, including but not limited  
10 to:

- 11 a. Whether the Defendant has undertaken a common business practice of  
12 producing and selling to the public Tréo™ 650 smartphones that fail to  
13 automatically download e-mail messages, as Defendant advertised and  
14 otherwise represented;
- 15 b. Whether Defendant adequately disclosed this condition, and/or concealed  
16 the fact that Tréo™ 650 smartphone would would perform in this manner;
- 17 c. Whether Defendant engaged in unfair, unlawful and/or fraudulent business  
18 practices;
- 19 d. Whether Defendant's use of advertising and other representations constitute  
20 unfair competition, unfair, deceptive, untrue or misleading advertising;
- 21 e. Whether Defendant failed to disclose material facts about Tréo™ 650  
22 smartphone;
- 23 f. Whether Defendant's were unjustly enriched by its conduct;
- 24 g. Whether Defendant's breached the implied covenant of good faith and fair  
25 with Plaintiff and the Class; and  
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1 h. Whether class members are entitled to damages including punitive  
2 damages, restitution, disgorgement of profits, and injunctive relief, and the  
3 proper measure, nature and extent of such relief.

4 43. These common questions and others predominate over questions, if any, that affect  
5 only individual members of the Class. Fed. R. Civ. P. 23(b)(3).  
6

7 44. Plaintiff's claims are typical of, and not antagonistic to, the claims of the other  
8 Class members because Plaintiff, by advancing its claims, will also advance the claims of all  
9 members of the Class and because Defendant palmOne, Inc. participated in activity that caused  
10 members of the Class to suffer similar injury. Fed.R.Civ.P. 23(a)(3).  
11

12 45. Plaintiff and its counsel will fairly and adequately protect the interests of absent  
13 Class members. There are no material conflicts between Plaintiff's claims and those of absent  
14 Class members that would make class certification inappropriate. Counsel for Plaintiff are  
15 experienced in complex class action litigation and will vigorously assert Plaintiff's claims and  
16 those of the members of the Class. Fed. R. Civ. P 23(a)(4).  
17

18 46. A class action is superior to other methods for the fair and efficient resolution of  
19 this controversy. The class action device presents fewer management difficulties, and provides the  
20 benefit of a single adjudication, economy of scale, and comprehensive supervision by a single  
21 court. Fed.R.Civ.P. 23(b)(3).  
22

23 47. Whatever difficulties may exist in the management of the class action will be  
24 greatly outweighed the benefits of the class action procedure, including but not limited to  
25 providing Class members with a method for the redress of claims that may not otherwise warrant  
26 individual litigation.  
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VI.  
**FIRST CAUSE OF ACTION**  
**(Violation of Consumer Legal Remedies Act)**

48. Plaintiff incorporates by reference all proceeding paragraphs as if fully set forth herein.

49. The Consumer Legal Remedies Act ("CLRA") applies to Defendant's actions and conduct described herein because it extends to transactions that are intended to result, or which have resulted, in the sale or lease of goods or services to consumers.

50. Plaintiff and each member of the Class are "consumers" within the meaning of Civil Code Section 1761(d).

51. The PalmOne, Inc. Trēo™ 650 smartphone that Plaintiff and each member of the Class own are "goods" within the meaning of Civil Code Section 1761(a).

52. Defendant has violated the CLRA in at least the following respects:

- a. In violation of Section 1770(a)(5), Defendant has represented that the Trēo™ 650 smartphone has characteristics and benefits that it does not have;
- b. In violation of Section 1770(a)(7), Defendant has represented that the Trēo™ 650 smartphone is of a particular standard, quality, or grade when it is not; and,
- c. In violation of Section 1770(a)(9), Defendant has advertised Trēo™ 650 smartphone with an intent not to sell them as advertised.

53. As set forth above, Defendant's failure to disclose the inability of the Trēo™ 650 smartphone to perform its advertised functions, and its conscious concealment of the inherent defects in the Treo 650, are omissions and concealments of material fact that constitute unfair, deceptive, and misleading business practices in violation of Civil Code Section 1770(a).

54. Defendant's deceptive acts and omissions occurred in the course of selling a consumer product and have done so continuously through the filing of this Complaint.

55. Defendant's deceptive acts and omissions, as set forth more fully herein, were material to all persons contemplating the purchase of a Trēo™ 650 smartphone.

1           56. Defendant's concealed material facts regarding the Trêo™ 650 smartphone from  
2 Plaintiff and other class members, including that it fails to automatically download e-mail  
3 messages as advertised and is inherently defective and is not of merchantable quality. This type of  
4 information is relied upon by consumers in making purchase decisions, and is fundamental to the  
5 decision to purchase a Trêo™ 650 smartphone. Had Defendant disclosed such information, it  
6 would have been known to Plaintiff and other class members through the marketing and  
7 advertising presented to Plaintiff by retailers, resellers, defendants, the trade press and others.

8            57. Had Defendant disclosed this material information regarding the Treo™ 650  
9 smartphone to Plaintiff and the other class members, they would not have purchased the Treo 650.

58. As a direct and proximate result of Defendant PalmOne, Inc.'s violation of Civil Code Section 1770, *et seq.*, Plaintiff and other Class members have suffered irreparable harm and monetary damages. Plaintiff, on behalf of himself and on behalf of the Class, seeks damages, injunctive relief and all other relief allowable under the CLRA.

59. Defendant's wrongful conduct, as set forth above, was willful, oppressive, immoral, unethical, unscrupulous, substantially injurious and malicious. Accordingly, Plaintiff seeks punitive damages against Defendant in an amount to deter Defendant from similar misconduct in the future pursuant to Civil Code Section 1780 (a)(4).

18           60. Pursuant to Civil Code Section 1782, Plaintiff provided notice to Defendant  
19 concurrently with the filing of this Complaint and will amend the complaint once the statutory  
20 period has ended.

21           61.       WHEREFORE, pursuant to the provisions of Civil Code § 1780, Plaintiff is  
22       entitled to restitution and other appropriate equitable relief, an order enjoining Defendant from the  
23       unlawful practices described herein, as well as recovery of attorney's fees and cost of litigation.

24 VII.

25 SECOND CAUSE OF ACTION

25 SECOND CAUSE OF ACTION  
26 (Violation of Bus. & Prof. Code Section 17200 by Plaintiff,  
individually and on behalf of the Class)

27           62.     Plaintiff incorporates by reference all proceeding paragraphs as if fully set forth  
28 herein.

1           63. Plaintiff brings this cause of action on behalf of himself and on behalf of the Class  
2 against Defendant for its unlawful, unfair, untrue and/or deceptive business acts and/or practices  
3 pursuant to California Business and Professions Code Sections 17200 *et seq.*, which prohibits all  
4 unlawful, unfair and/or fraudulent business acts and/or practices.

5           64. Plaintiff asserts these claims on behalf of the Class who have expended funds that  
6 Defendant should be required to pay or reimburse under the equitable and restitutionary remedies  
7 provided by California Business and Professions Code Sections 17200 *et seq.*

8           65. The acts, misrepresentations, omissions, and practices of Defendants alleged above  
9 constitute unfair, unlawful and/or fraudulent business acts and/or practices within the meaning of  
10 California Business and Professions Code Sections 17200 *et seq.*

11           66. By engaging in the above-described acts and practices, Defendant has committed  
12 one or more acts of unfair competition within the meaning of Business and Professions Code  
13 Sections 17200, *et seq.*

14           67. Defendant's conduct, as fully described above, was likely to deceive  
15 members of the consuming public, and at all times, Defendant's statements concerning its Trēo™  
16 650 smartphone has been and continues to be unlawful, unfair, fraudulent, untrue and/or  
17 deceptive.

18           68. Defendant engaged in unlawful business practices by violating the Consumers  
19 Legal Remedies Act, Code sections 1750 *et seq.*, and the False Advertising Act, Business and  
20 Professions Code sections 17500 *et seq.* as alleged herein.

21           69. Defendant's misconduct as alleged in this action constitutes negligence and  
22 other tortuous conduct and this misconduct gave Defendant an unfair competitive advantage over  
23 its competitors.

24           70. As a direct and proximate result of the aforementioned acts, Defendant received  
25 monies and continues to hold the monies expended by Plaintiff and others similarly situated who  
26 purchased the Trēo™ 650 smartphone, a device that fails to download email messages  
27 automatically as advertised, as described herein.

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- 1           A.     An order certifying this case as a class action and appointing Plaintiff and his  
2 counsel to represent the Class;
- 3           B.     Actual damages for injuries suffered by plaintiff and the Class pursuant to  
4 California Civil Code § 1780(a)(1);
- 5           C.     For an order awarding restitution and disgorgement of the monies Defendant  
6 wrongfully acquired through the sales of PalmOne, Inc. Tréo™ 650 smartphone as a result of  
7 Defendant's unlawful, unfair, and deceptive acts and/or practices, together with interest thereon  
8 from the date of payment, to the victims of such violations;
- 9           D.     For statutory damages in an amount of not less than \$1,000 per Plaintiff or class  
10 member pursuant to California Civil Code § 1780(a)(1);
- 11          E.     An order requiring Defendant to immediately cease its wrongful conduct as set  
12 forth above; enjoining Defendant from continuing to falsely market and advertise, conceal  
13 material information and conduct business via the unlawful and unfair business acts and practices  
14 complained of herein; ordering Defendant to engage in a corrective notice campaign; and  
15 requiring Defendant to implement a full replacement program of all defective Tréo™ 650  
16 smartphones at issue with fully functional devices;
- 17          F.     Punitive damages in an amount to deter Defendant from similar misconduct in the  
18 future pursuant to California Civil Code § 1780(a)(4);
- 19          G.     For reasonable attorneys' fees and the costs of this action pursuant to California  
20 Code of Civil Procedure §§ 1021.5 and 1033.5(a)(10)(B), and attorneys fees pursuant to California  
21 Civil Code § 1780(d);
- 22          H.     For statutory pre-judgment interest; and
- 23          I.     For such other relief as this Court may deem just and proper.
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3 **DEMAND FOR JURY TRIAL**

4 Plaintiff demands a trial by jury for himself and the class on all claims so triable.  
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7 DATED: September 19, 2005

SHELLER, LUDWIG & BADEY, P.C.

8  
9 BY:

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